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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 558

R. H. NYE AND L. C. MAYERS,

Petitioners,

vs.

**THE UNITED STATES OF AMERICA AND W. B.
GUTHRIE.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

✓
**J. BAYARD CLARK,
T. A. McNEILL,
O. L. HENRY,
L. R. VARSER,**
Counsel for Petitioners.

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FOR THE FOURTH CIRCUIT.**

*To the Honorables, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Your petitioners, R. H. Nye and L. C. Mayers respectfully submit their petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals from the Fourth Circuit in the above entitled case (R. 174):

The Circuit Court of Appeals for the Fourth Circuit has affirmed on appeal a judgment of the District Court of the United States for the Middle District of North Carolina,

holding the respondents guilty in contempt, wherein petitioner Nye was fined \$500.00 and required to pay W. B. Guthrie, plaintiff's attorney, \$500.00 and taxed with the costs, and petitioner Mayers was fined \$250.00 (R. 6).

Statement of the Case.

This contempt proceeding arose in the case of W. H. Elmore, Administrator of James Elmore, deceased, plaintiff, against C. T. Council and Germain Barnard, partners trading and doing business as the B-C Remedy Company, defendants, then pending in the Middle District of North Carolina, Durham Division.

On 29 September, 1939, the District Court was hearing a motion by defendants to dismiss this case. The cause alleged for dismissal was that the plaintiff had filed his final account as administrator of James Elmore, deceased, in the Clerk's office of the Superior Court of Robeson County, North Carolina, and had been discharged as such administrator, and on this hearing W. H. Elmore testified.

On 30 September, 1939, the District Court issued an order to show cause, reciting that the attorney for the plaintiff had moved the court to issue the order and that W. H. Elmore on oath testified to facts that the said R. H. Nye and L. C. Mayers (Meares) had been guilty of behavior contemptuous of the court (R. 8). The result of this hearing was a holding that the petitioners Nye and Mayers were guilty of contempt (R. 6).

Respondents appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court on 30 August, 1940. The opinion of the court was by Soper, Circuit Judge. Circuit Judges Parker and Dobie agreed (R. 168).

Questions Presented.

1. Was this contempt proceeding properly constituted without an affidavit made for the purpose of supporting the

order to show cause, and did the court have jurisdiction thereof?

2. Were the respondents guilty of contempt?

3. Did the judgment of non-suit rendered herein by consent of plaintiff on the 13th day of March, 1940, undermine and render the judgment against respondents in contempt, void?

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals has rendered a decision in this matter which conflicts with other decisions of Circuit Courts of Appeals, including interpretations of decisions of this Court. The District Court treated this as civil contempt under Judicial Code, Section 268, Title 28, U. S. C. A. Section 385, while the Circuit Court of Appeals considered the matter as coming under 28 U. S. C. A., paragraphs 385-390. This question is most important to the public, to the courts and to the parties, and involves a construction of the power and jurisdiction of Federal District Courts to punish for contempt, including the application of the limitation prohibiting the extension of the power to punish for contempt set forth in so much of Section 268, Judicial Code, as was embraced in the Act March 2, 1831. The decision of the Circuit Court of Appeals in this case is in apparent conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in "In Re Sixth & Wisconsin Tower, Inc. Dufenhorst v. Aitkin, et al.", 108 F. (2d) 538, in which case the Seventh Circuit Court of Appeals followed the Second Circuit Court of Appeals in "In Re Probst, 205 Fed. 512, 513" and by these it appears that the Second and Seventh Circuit Courts of Appeal have applied a restricted construction to Judicial Code Section 268, and the Fourth Circuit Court of Appeals has applied a liberal con-

struction greatly extending the power to punish for contempt beyond that exercised in these other two circuits.

It is very important, indeed, to the public that it be determined finally whether an affidavit is necessary to support an order to show cause in contempt, according to the common law rule applicable in all the States except where changed by statute or constitutional enactment. In the Fourth Circuit it seems to be unnecessary for an affidavit to be filed on which to issue the order to show cause. With much respect, the respondents contend that they did not waive this requirement and that the affidavit filed a week after the order to show cause was not sufficient.

Another reason presented by the petitioners is that since this proceeding must needs be for civil contempt in order to aid one of the parties that an action must be pending in the District Court at all times, throughout the period of appeal to the Circuit Court of Appeals, a pending cause in the District Court, and that the voluntary non-suit taken by the plaintiff in March, 1940, pending the appeal in the Circuit Court of Appeals in the contempt matter, deprived the contempt proceeding of any sufficient support. If the plaintiff settled his case upon satisfactory terms and was paid therefor, his rights had not suffered on account of the matters in the contempt proceeding and if he, for any other reason, took a non-suit, this expressed his satisfaction with a cessation of the main action.

All of these questions are important. In fact, any exercise of the power to punish for contempt is a serious question, and when the powers of the Court and the rights of the parties and the method of proceedings are not definitely settled, serious rights may be jeopardized.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, com-

manding said Court to certify and to send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in said matter, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the statutes of the United States and the rules of this Court, and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to the Court may seem proper.

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L. C. Mayers, Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 558

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THE UNITED STATES OF AMERICA AND W. B.
GUTHRIE.

**SUPPORTING BRIEF OF PETITIONERS ON WRIT OF
CERTIORARI.**

This Court has jurisdiction. It is provided in Judicial Code, Section 240, as amended, 28 U. S. C. A. Section 347, that any judgment of a Circuit Court of Appeals may be reviewed by this Court only upon writ of certiorari and this section gives this Court jurisdiction to grant the writ of certiorari and to make a complete review of the decision of the Circuit Court of Appeals of the Fourth Circuit.

The power determining what cases shall be brought up is vested in the Supreme Court, and this power is not limited.

Ex parte Chetwood, 165 U. S., 443;

Warner v. New Orleans, 176 U. S., 474;

Title Guaranty & Surety Co. v. U. S., 222 U. S. 401.

While the petitioners recognize that the granting of writs of certiorari is within the judicial discretion of this Court, the petitioners contend that the questions involved are of sufficient importance and that there is no doubt of the jurisdiction to grant the writ.

Respectfully submitted,

J. BAYARD CLARK,

T. A. McNEILL,

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*Attorneys for R. H. Nye and
L. C. Mayers, Petitioners.*

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